

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BEN JOHNSON	:	CIVIL ACTION
	:	
v.	:	
	:	
KING MEDIA, INC.	:	NO. 01-2311
	:	
v.	:	
	:	
ZEBRA MARKETING.COM, ET AL.	:	

MEMORANDUM

Padova, J.

June 24, 2002

Plaintiff, who purchases advertising space for resale to commercial businesses, has brought this breach of contract action against King Media, Inc. ("King Media") for failure to pay for advertising space purchased by Plaintiff on behalf of King Media. King Media has brought a Third Party Complaint against Zebra Marketing.com, Brett Beck, Robert Roark, and Clinton Roark for breach of contract, alleging that they breached an agreement to pay for half of the advertising space purchased by Plaintiff for King Media. Before the Court is Third Party Defendant Brett Beck's "Motion to Dismiss or in the Alternative for Separate Trial." For the reasons which follow, the Motion to Dismiss is denied and the Motion for Separate Trial is granted.

I. BACKGROUND

The Complaint alleges that King Media asked Plaintiff to purchase space for print advertising to be inserted in certain publications between November 2000 and February 2001 and failed to pay Plaintiff \$246,920 for that space. The Third Party Complaint

alleges that Zebra Marketing.com is a Colorado partnership made up of Brett Beck, Robert Roark, and Clinton Roark (the "Partnership"). In April or May of 2000, King Media entered into an agreement with the Partnership to advertise a product known as an Electro-mechanical Muscle Stimulator, "EMS", through print media. King Media and the Partnership agreed to split all print media costs and expenses. The Partnership decided where and when the advertisements would run and made the necessary arrangements to place the advertisements. King Media agreed to pay one half of the total invoices for the advertisements and the Partnership agreed to pay the other half. The Third Party Complaint further alleges that, to the extent Plaintiff is able to prove the damages alleged in the Complaint, the Third Party Defendants are liable for some of those damages as a result of their agreement with King Media.

II. DISCUSSION

Beck has moved to dismiss the Third Party Complaint pursuant to Federal Rules of Civil Procedure 12(b)(2) and 12(b)(6). He has also moved, in the alternative, for a separate trial of the claims brought against him pursuant to Federal Rule of Civil Procedure 42(b).

A. Rule 12(b)(2)

Beck has moved to dismiss the Third Party Complaint as against him for lack of personal jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(2). Pursuant to Federal Rule of

Civil Procedure 4(e), a federal court may exercise personal jurisdiction over a nonresident of the state in which the court sits to the extent authorized by the law of that state. Pennzoil Prods. Co. v. Colelli & Assocs., 149 F.3d 197, 200 (3d Cir. 1998) (citation omitted); Fed. R. Civ. P. 4(e). Pennsylvania's long arm statute authorizes exercise of jurisdiction over a nonresident person "to the fullest extent allowed under the Constitution of the United States." 42 Pa. Cons. Stat. Ann. § 5322(b) (West Supp. 2002); Pennzoil, 149 F.3d at 200. In evaluating whether an exercise of personal jurisdiction is constitutional, a court first determines whether the defendant's contacts with the forum state are sufficient to support general personal jurisdiction. Pennzoil, 149 F.3d at 200. General jurisdiction exists where a nonresident's contacts with the forum are "continuous and substantial," and permits the court to exercise jurisdiction "regardless of whether the subject matter of the cause of action has any connection to the forum." Id.

In the absence of general jurisdiction, a court looks to whether the requirements of specific personal jurisdiction are met. Specific jurisdiction exists where the plaintiff's claim "is related to or arises out of the defendant's contacts with the forum." Id. at 201 (citations omitted). The analysis of specific jurisdiction involves two inquiries, the first mandatory and the second discretionary: (1) whether the defendant had minimum

contacts with the forum such that it would have "reasonably anticipate[d] being haled into court there," id. (quoting World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980)); and (2) whether "the assertion of personal jurisdiction would comport with 'fair play and substantial justice.'" Id. (citations omitted). Although the latter standard is discretionary, the Third Circuit Court of Appeals has "generally chosen to engage in this second tier of analysis in determining questions of personal jurisdiction." Id.

"A finding of minimum contacts demands the demonstration of 'some act by which the defendant purposely avail[ed] itself of the privilege of conducting business within the forum State, thus invoking the protection and benefits of its laws.'" Id. at 203 (citations omitted). The court also takes into account "the relationship among the forum, the defendant and the litigation." Mellon Bank (East) PSFS, Nat'l Ass'n v. Farino, 960 F.2d 1217, 1221 (3d Cir. 1992) (quoting Shaffer v. Heitner, 433 U.S. 186, 204 (1977)). The Supreme Court has provided guidance in analyzing minimum contacts in a contract matter:

[W]ith respect to interstate contractual obligations, we have emphasized that parties who 'reach out beyond one state and create continuing relationships and obligations with citizens of another state' are subject to regulation and sanctions in the other State for the consequences of their activities [W]here the defendant 'deliberately' has engaged in significant activity within a State, or has created 'continuing obligations'

between himself and residents of the forum, he manifestly has availed himself of the privilege of conducting business there, and because his activities are shielded by 'the benefits and protections' of the forum's law it is presumptively not unreasonable to require him to submit to the burdens of litigation in that forum as well.

Id. at 1222 (quoting Burger King Corp. v. Rudzewicz, 471 U.S. 462, 475-76 (1985) (citations omitted)). The plaintiff bears the burden of coming forward with facts sufficient to establish the existence of minimum contacts. Id. at 1223.

To evaluate the "fair play and substantial justice" prong of the standard for specific personal jurisdiction, a court applies the following "fairness factors": "the burden on the defendant, the forum State's interest in adjudicating the dispute, the plaintiff's interest in obtaining convenient and effective relief, the interstate judicial system's interest in obtaining the most efficient resolution of controversies, and the shared interest of the several States in furthering fundamental substantive social policies." Pennzoil, 149 F.3d at 205-206 (citations omitted). At this point in the analysis, the defendant carries the burden. See Farina, 960 F.2d at 1226 ("[O]nce the plaintiff has made a prima facie case for jurisdiction based upon minimum contacts, the burden falls upon the defendant to show that the assertion of jurisdiction is unconstitutional. This burden is met when the defendant demonstrates to the court that factors are present that make the exercise of jurisdiction unreasonable.") (emphasis in original).

Beck argues that the Third Party Complaint should be dismissed as against him because he is a citizen of Colorado. King Media argues that this Court has specific jurisdiction over Beck. King Media has submitted the Affidavit of Allen Stern, the President of King Media, in support of the exercise of in personam jurisdiction.

Allan Stern states in his Affidavit that he was initially contacted by telephone in his Wayne, Pennsylvania office by Beck's partner, Clinton Roark, proposing a business deal involving the marketing of a product known as "The Body Toner." (Stern Aff. ¶ 1.) Stern traveled to Las Vegas, Nevada to meet with Clinton Roark. (Id. ¶ 2.) Clinton Roark informed Stern that he was acting on behalf of a partnership, his partners being Brett Beck and Robert Roark. (Id. ¶ 3.) As a result of the meeting, Stern reached an agreement in April 2000 to do business with the Partnership. (Id. ¶ 4.) This agreement was not reduced to writing. (Id.) Pursuant to their agreement, Beck selected the print advertising agencies they used and chose the timing, location and pricing of all print advertising for The Body Toner. (Id. ¶ 6.) Beck called Stern at his office in Pennsylvania on a daily basis from May through November 2000 to discuss media purchasing decisions and related business issues with respect to The Body Toner, the Zolex Hammer Golf Club, the Air Hammer Golf Club, and the Abdominizer. (Id. ¶ 7.) Beck also sent mail and fax

correspondence to Stern in his Pennsylvania office on a regular and continuous basis concerning advertising and media results for the Body Toner, the Zolex Hammer Golf Club, the Air Hammer Golf Club, and the Abdominizer. (Id. ¶ 13.) Beck selected and arranged for print advertisements to be run in the following magazines, which are sold or otherwise distributed in Pennsylvania: Stuff, Gear, Esquire, Men's Workout, FHM, Perfect 10, and Penthouse. (Id. ¶ 8.) He also participated in the creative development of advertisements for the Body Toner and Abdominizer which were placed in those magazines and distributed in Pennsylvania. Beck also arranged for advertising to be run in airline on-board magazines for American, Continental, America West, Delta and SouthWest airlines, all of which magazines were sold or otherwise distributed in Pennsylvania. (Id. ¶¶ 9-10.) Beck also participated in developing television commercials for the Body Toner and Abdominizer which aired in Pennsylvania as well as other states. (Id. ¶ 14.) In addition to his daily calls concerning media purchasing decisions, Beck also telephoned Stern in his Pennsylvania office on a weekly basis to ask about the payment of monies, including "partner distributions" in connection with these advertisements. (Id. ¶ 11.) King Media made payments to the Partnership by electronic or wire transfer from King Media's bank account in Pennsylvania to a Colorado bank account in the name of Zebra Marketing. (Id. ¶ 12.)

The Court finds, based upon the uncontroverted record, that Beck's contacts with this Commonwealth are not sufficiently continuous or systematic to subject him to general jurisdiction here. King Media argues that this Court has specific jurisdiction over Beck, based upon his purposeful contacts with King Media in Pennsylvania in furtherance of the agreement between King Media and the Partnership. The United States Court of Appeals for the Third Circuit recently discussed the relevant inquiry to be made with regard to personal jurisdiction in a contract case in General Elec. Co. v. Deutz AG, 270 F.3d 144 (3d Cir. 2001):

In contract cases, courts should inquire whether the defendant's contacts with the forum were instrumental in either the formation of the contract or its breach. Parties who reach out beyond [their] state and create continuing relationships and obligations with citizens of another state are subject to the regulations of their activity in that undertaking. Courts are not reluctant to find personal jurisdiction in such instances. [M]odern transportation and communications have made it much less burdensome for a party sued to defend himself in a State where he engages in economic activity. . . .

Id. at 150 (citations omitted). Although Beck did not physically enter Pennsylvania in connection with this agreement, his electronic and other contacts with this forum may be sufficient to establish jurisdiction: "[i]n modern commercial business arrangements . . . communication by electronic facilities, rather than physical presence, is the rule. Where these types of long-

term relationships have been established, actual territorial presence becomes less determinative." Id. at 150-51.

The record before the Court establishes that the partnership of which Beck is a partner purposefully entered into an agreement to conduct business with a Pennsylvania corporation, to perform work which the partnership knew King Media would perform in its Pennsylvania office. Beck continuously communicated with King Media in its Pennsylvania office with regard to that work by mail, telephone and electronic communications and actively engaged in that work by telephone and facsimile with King Media in its Pennsylvania office. In addition, and in furtherance of the partnership's agreement with King Media, Beck was instrumental in creating and placing advertising in print media distributed in Pennsylvania. The Court finds that King Media has met its burden of coming forward with facts sufficient to establish the existence of minimum contacts to support the exercise of specific personal jurisdiction. See Mellon Bank (East) PSFS, Nat'l Ass'n v. Farino, 960 F.2d 1217, 1223; see also Remick v. Manfredy, 238 F.3d 248, 256-57 (3d Cir. 2201) (finding that the district court had personal jurisdiction over Manfredy for purposes of Remick's contract claim where Manfredy, a non-forum resident, called Remick's associate in Philadelphia to retain Remick, an attorney; Manfredy signed a retainer agreement and sent it to Remick in Philadelphia; Manfredy sent payments to Remick in Philadelphia; and Manfredy knew that

Remick would perform services for him in Philadelphia because Remick's office is in Philadelphia); see also Grand Entm't Group, Ltd. v. Star Media Sales, Inc., 988 F.2d 476, 482 (3d Cir. 1993) ("Mail and telephone communications sent by the defendant into the forum may count toward the minimum contacts that support jurisdiction.").

As King Media has established the requisite minimum contacts between Beck and the Commonwealth, Beck next has the burden to show that the assertion of personal jurisdiction would not comport with the notions of "fair play and substantial justice" in order to defeat personal jurisdiction. Sundance Rehab. Corp. v. Senior Living Prop., LLC, No.Civ.A. 00-5217, 2001 WL 683766, at *2 (E.D. Pa. June 14, 2001). Beck has not submitted any evidence that the assertion of personal jurisdiction would be unreasonable in this case. King Media has an interest in obtaining convenient and effective relief and Pennsylvania has an interest in providing redress for a contractual breach inflicted on its citizen. Cottman Transmission Sys., Inc. V. Miller, No.Civ.A. 00-cv-3283, 2000 WL 1277928, at *5 (E.D. Pa. Sept. 7, 2000). Therefore, the Court concludes that the fairness factors support the exercise of personal jurisdiction in this case. Accordingly, Beck's Motion pursuant to Rule 12(b)(2) is denied.

B. Rule 12(b)(6)

Beck has also moved to dismiss the Third Party Complaint against him for failure to state a claim upon which relief may be granted pursuant to Federal Rule of Civil Procedure 12(b)(6). Beck claims that King Media cannot state a claim against him for breach of contract because its contract is not with him personally, but with Zebra Marketing.com, a corporation.

When determining a Motion to Dismiss pursuant to Rule 12(b)(6), the court may consider only the facts alleged in the complaint, attachments to the complaint, and matters of public record. Pension Ben. Guarantee Corp. v. White Consol. Indus., Inc., 998 F.2d 1192, 1196 (3d Cir. 1993). The court must accept as true all well-pleaded allegations in the complaint and view them in the light most favorable to the Plaintiff. Angelaastro v. Prudential-Bache Securities, Inc., 764 F.2d 939, 944 (3d Cir. 1985). A Rule 12(b)(6) motion will be granted when a Plaintiff cannot prove any set of facts, consistent with the complaint, which would entitle him or her to relief. Ransom v. Marrazzo, 848 F.2d 398, 401 (3d Cir. 1988).

The Third Party Complaint asserts claims against Beck as a partner of the Zebra Marketing.com partnership with which King Media contracted in April 2000. Under both Pennsylvania and Colorado law, a partner is jointly liable for all debts and obligations of the partnership. See In re Labrum & Doak, L.L.P., 237 B.R. 275 (Bankr. E.D. Pa. 1999) (citations omitted); see also

In re S & D Foods, Inc., 144 B.R. 121, 163 (Bankr. D. Colo. 1992) (citations omitted).

Beck relies on public record information from the Colorado Secretary of State to argue that he has no personal liability in this matter. That information states that Zebra Marketing.com is a limited liability company ("LLC") which was incorporated on August 22, 2000. (Mot. to Dismiss Ex. A.) It also states that Beck is the registered agent of that LLC. (Id.)

Zebra Marketing.com was not incorporated until four months after the Partnership entered into its agreement with King Media. The incorporation of Zebra Marketing.com after the partners entered into their agreement with King Media cannot, therefore, protect the partners from personal liability to King Media arising out of that agreement. Accordingly, Beck's motion to dismiss pursuant to Rule 12(b)(6) is denied.

C. Rule 42(b)

Beck has also moved, in the alternative, for a separate trial of the third party claims against him pursuant to Federal Rule of Civil Procedure 42(b) which provides that the "Court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any claim, cross-claim, counterclaim or third-party claim. . . ." Fed. R. Civ. P. 42(b). When deciding whether to sever claims, the Court is required to balance "the convenience

of the parties, avoidance of prejudice to either party, and promotion of the expeditious resolution of the litigation." Official Comm. of Unsecured Creditors v. Shapiro, 190 F.R.D. 352, 355 (E.D. Pa. 2000) (citations omitted). The Court looks at the following factors:

(1) whether the issues sought to be tried separately are significantly different from one another, (2) whether the separable issues require the testimony of different witnesses and different documentary proof, (3) whether the party opposing the severance will be prejudiced if it is granted, and (4) whether the party requesting the severance will be prejudiced if it is not granted.

Id. Plaintiff and King Media have agreed to binding arbitration of Plaintiff's claim against King Media. Beck has not agreed to join that arbitration. Accordingly, the first party claims would be resolved more expeditiously and economically if the third party claim is tried separately. Moreover, the issues in the first party and third party claims are not the same, different witnesses and proof would be necessary for trial of the third party claims, and if King Media prevails at arbitration, its third party claim against Beck would be moot. The Court finds that these factors support a separate trial of the third party claims. Therefore, the Motion for Separate Trial is granted.

An appropriate order follows.

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O R D E R

AND NOW, this day of June, 2002, in consideration of Third Party Defendant Brett Beck's Motion to Dismiss or in the Alternative for Separate Trial (Docket No. 25) and Third Party Plaintiff King Media's response thereto, **IT IS HEREBY ORDERED** as follows:

1. Third Party Defendant Brett Beck's Motion to Dismiss is **DENIED**;
2. Third Party Defendant Brett Beck's Motion for Separate Trial is **GRANTED**.

BY THE COURT:

John R. Padova, J.